APPENDIX VII

OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, reported at 226 F. 2d 1.

(September 30, 1955.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: Two Water Control and Improvement Districts, political subdivisions of the State of Texas, and two individuals, filed a complaint against a Texas corporation and a number of individuals, seeking a declaratory judgment and injunction. Federal jurisdicaion rests solely on 28 U.S.C.A. § 1331, which is:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

The plaintiffs, appellants here, assert that they have certain rights to divert and use waters of the Rio Grande which inure by virtue of or are protected by the Treaty between the United States and Mexico effective November 8, 1945, and a protocol supplementary thereto. This action was brought for a declaration of plaintiffs' asserted rights and to prevent the taking of waters from the Rio Grande by the defendants, who are the appellees here, in derogation of the rights of the plaintiffs.

In the complaint it is said that prior to the treaty waters of the Rio Grande were being diverted and used in the Counties of Hidalgo, Willacy and Cameron, Texas, for the irrigation of some

500,000 acres of land and for supplying water for domestic, municipal and industrial purposes to a population of 250,000. Of the water so diverted and used, a substantial portion had its origin in Mexico and it had begun to tap the tributaries in its territory to the lessening of the flow of the Rio Grande. Drought added to the diminution of the flow of the stream. Little of the periodic flood flows were used. Problems also existed with respect to the waters of the Colorado River. With these we are not here concerned.

In the treaty preamble the purpose was recited as being "to fix and delimit the rights of the two countries with respect to the waters . . . of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, United States of America, to the Gulf of Mexico, in order to obtain the most complete and satisfactory utilization thereof . . ."

The treaty begins with definitions, the only one of which we need notice being:

> "'To divert' means the deliberate act of taking water from any channel in order to convey it elsewhere for storage, or to utilize it for domestic, agricultural, stock-raising or industrial purposes whether this be done by means of dams across the channel, partition weirs, lateral intakes, pumps or any other methods." Treaty, Art. 1 (d).

The International Boundary Commission, set up under a prior treaty, was continued with new powers and duties under a name changed to the International Boundary and Water Commission. An allotment of the waters of the Rio Grande was made by the treaty between the two countries. Agreements were made for the construction of dams and for the study and planning of flood control works plants for generating electric current. Regulations were contemplated to provide for water conservation programs.

(OPINION OF COURT OF APPEALS, CONTINUED)

The claim of plaintiffs is based upon and solely upon the treaty and particularly upon Article 9 of the treaty which provides:

"(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey water belonging to it.

"(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas, to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information.

"(c) Consumptive uses from the main stream and from the unmeasured tributaries below Fort Quitman shall be charged against the share of the country making them.

"(d) The Commission shall have the power to authorize either country to divert and use water not belonging entirely to such country, when the water belonging to the other country can be diverted and used without injury to the latter and can be replaced at some other point on the river.

"(e) The Commission shall have the power to authorize temporary diversion and use by one country of water belonging to the other, when the latter does not need it or is unable to use it, provided that such authorization or the use of such water shall not establish any right to continue to divert it.

"(f) In case of the occurrence of an extraordinary drought in one country with an abundant supply of water in the other country, water stored in the international storage reservoirs and belonging to the country enjoying such abundant water supply may be withdrawn, with the consent of the Commission, for the use of the country undergoing the drought.

"(g) Each country shall have the right to divert from the main channel of the river any amount of water, including the water belonging to the other country, for the purpose of generating hydroelectric power, provided that such diversion causes no injury to the other country and does not interfere with the international generation of power and the quantities not returning directly to the river are charged against the share of the country making the diversion. The feasibility of such diversions not existing on the date this Treaty enters into force shall be determined by the Commission, which shall also determine the amount of water consumed, such water to be charged against the country making the diversion.

"(h) In case either of the two countries shall construct works for diverting into the main channel of the Rio Grande (Rio Bravo) or its tributaries waters that do not at the time this Treaty enters into force contribute to the flow of the Rio Grande (Rio Bravo) such water shall

belong to the country making such diversion.

"(i) Main stream channel losses shall be charged in proportion to the ownership of water being conveyed in the channel at the times and places of the losses.

"(j) The Commission shall keep a record of the waters belonging to each country and of those that may be available at a given moment, taking into account the measurement of the allotments, the regulation of the waters in storage, the consumptive uses, the withdrawals, the diversions and the losses. For this purpose the Commission shall construct, operate and maintain on the main channel of the Rio Grande (Rio Bravo), and each Section shall construct, operate and maintain on the measured tributaries in its own country, all the gaging stations and mechanical apparatus necessary for the purpose of making computations and of obtaining the necessary data for such record. The information with respect to the diversions and consumptive uses on the unmeasured tributaries shall be furnished to the Commission by the appropriate Section. The cost of construction of any new gaging stations located on the main channel of the Rio Grande (Rio Bravo) shall be borne equally by the two Governments. The operation and maintenance of all gaging stations or the cost of such operation and maintenance shall be apportioned between the two Sections in accordance with determinations to be made by the Commission."

By a protocol between the two governments, an agreement was made specifying the jurisdiction of agencies of the respective governments as to the construction or use of the works required in the performance of the treaty. The protocol does not contain any provision that has application to the problems here presented. In

the Resolution of the Senate ratifying the treaty it was stipulated:

"Resolved, . . . That the Senate advise and consent to the ratification of . . . a treaty between the United States of America and the United Mexican States, . . . subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty: . . .

"(b) Insofar as they affect persons and property in the territorial limits of the United States, the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, and any other officer or employee of the United States, shall be subject to the statutory and constitutional controls and processes. Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States section of the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent of the Senate or otherwise.

"(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States."

The complaint avers that except for a few periods of flood flow the waters of the Rio Grande have been inadequate to supply uses existing prior to the treaty, and notwithstanding this fact and without any allocation of water by the United States Section of the International Boundary and Water Commission the defendants have diverted and used water from the stream for irrigation purposes. These diversions and uses were begun subsequent to the treaty. The complaint says "There is not now, nor is there any present prospect for, a supply of water adequate to supply both the diversions and uses existing on November 8, 1945, [the effective date of the treaty] and the defendants' diversions and uses."

Some of the defendants filed motions to dismiss. Others filed answers. The District Court granted the motions to dismiss as to the movant defendants and dismissed the action of its own motion as to the answering defendants. The dismissal was placed upon two grounds, lack of jurisdiction over the subject matter and failure to state a claim upon which relief could be granted.

It is apparent that the original claims of the plaintiffs had their origin under appropriative rights for use on lands not adjacent to the river, while the defendants claim riparian rights based upon ownership of land adjoining the river. The primary issue arises from the assertion by the plaintiffs that they have a right, created or protected by the treaty, to continue to divert and use the waters of the Rio Grande to the same extent as was done by them at the time of the treaty date without any diminution of such waters by the defendants. The defendants counter with the position that their riparian rights were at all times paramount to the appropriative rights of the plaintiffs, that such rights were vested property rights, that it was not intended that the treaty should create or protect any individual rights to water or the use thereof, and that if the treaty be construed to give it the effect of lessen-

ing the incidents of the riparian ownerships of defendants, the treaty provision so construed would be a deprivation of property without due process of law under the Fifth Amendment to the Constitution of the United States.

Since there is no diversity to support Federal jurisdiction, the action can be maintained only if some right, title, privilege or immunity dependent upon the treaty is set up or claimed so as to require the Court to apply, construe or pass upon the treaty in determining the right asserted. *Muse v. Arlington Hotel Co.*, 168 U. S. 430, 18 S. Ct. 109, 42 L. Ed. 531. See also *Crystal Spring Land & Water Co. v. City of Los Angeles*, 177 U. S. 169, 20 S. Ct. 573, 44 L. Ed. 720; *Devine v. City of Los Angeles*, 202 U. S. 313, 26 S. Ct. 652, 50 L. Ed. 1046. In their complaint, after outlining the basis of the allocation of the waters of the Rio Grande between the United States and Mexico, the plaintiffs aver: "Thus the investments and activities of these plaintiffs and other American users perfected a claim to the share of the flow of the lower Rio Grande which was allotted to the United States by the treaty, which claim was cognizable in international practice and was recognized in and given effect by the treaty." In their brief the plaintiffs say that "The sole right asserted against the Appellees and the sole basis of relief sought by appellants is the protection of their water supply conferred on them by said treaty provisions." It was held at an early date that "A case . . . may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." *Cohen v. Virginia*, 6 Wheat. (19 U. S.) 264, 5 L. Ed. 257. This rule still prevails and applies to cases arising under treaties as well as under the Constitution or laws. The case before us meets the test.

Since plaintiffs insist that their asserted priority of right to divert and use waters of the Rio Grande arises from the treaty,

it necessarily follows that under plaintiffs' theory the rights of defendants would be paramount in the absence of the treaty. Absent the treaty the appropriative right of plaintiffs "is in the nature of a hereditament appurtenant to the tract for the benefit of which the appropriation was made." 44 Tex. Jur. 60, Water § 44. On the other hand, no treaty intervening, the right of each of the defendants would be defined as: "The right of the owner of riparian land to use the water of the stream upon or bordering his tract is an appurtenance thereof in the nature of an incorporeal hereditament. It constitutes property within the meaning of the Constitution, and cannot be taken without his consent, save, perhaps, by condemnation and the payment of a just compensation." 44 Tex. Jur. 47, Water § 34. The observation made in an earlier case by the District Judge whose order is under review that "the Texas water laws and decisions are in hopeless confusion," is quoted in our opinion in *Martinez v. Maverick County Water Control and Improvement District*, 5th Cir. 1955, 219 F. 2d 666.

We have no choice but to agree with the defendants that if we should adopt the plaintiffs' theory of the construction of the treaty the result would be a holding that by the treaty the plaintiffs had acquired property rights which they did not have before and that defendants had been divested of property rights which they owned prior to the treaty. To so hold would bring the treaty into collision with the Constitution. In a case involving an earlier treaty between the United States and Mexico this Court, in an opinion by Judge Waller, said:

> "We should seek to avoid, if possible, a decision adjudging a treaty to be in conflict with the Constitution. It is not necessary to a decision in this case for us to pass upon the question of whether the treaty is violative of the prohibitions of the Federal Constitution, as we would

be compelled to do if the treaty required the construction contended for by Appellants." Amaya v. Stanolind Oil & Gas Co., 5th Cir. 1946, 158 F. 2d 554, Cer. den. 331 U. S. 808, 67 S. Ct. 1191, 91 L. Ed. 1828, Reh. den. 331 U. S. 867, 67 S. Ct. 1530, 91 L. Ed. 1871.

In the case before us, as in the Amaya case, we would avoid the question as to conflicts between treaty and Constitution. Under our view there is no such question presented.

The rule for construction of treaties has been thus stated: "Treaties are to be construed as other contracts according to the intent of the parties."" The Yulu, 5th Cir. 1934, 71 F. 2d 635, Cer. den. 293 U. S. 589, 555 S. Ct. 104, 79 L. Ed. 684. Cited in the case of *The Yulu is Wright v. Henkel*, 190 U. S. 40, 23 S. Ct. 781, 47 L. Ed. 948, where it is held that "Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose." Other like holdings might, if need be, bee cited at length.

Plaintiffs, in their brief, say that the "treaty provision is clear and needs no construction, it was intended to mean just what it says." We do not read into the treaty that which plaintiffs contend it says. The manifesst purpose of the contracting parties is declared in the preamble to the treaty to be, among other things, "to fix and delimit the rights of the two countries with respect to the waters . . . of the Rio Grande." The language of the treaty relied upon by plaintiff is:

> "Either of the two countries may . . . divert and use the water belonging to it . . . However, no such diversion or use, not existing on the date this Treaty enters into force shall be permitted in either country . . . "

The plaintiffs with plausibility insist that, as used in the treaty, "government" and "country" have different meanings and that "country" refers to the land and people. There is, we agree, a difference in the meaning of the two words. Like many another term the word "country" cannot be given a hard and fast definition applicable alike to every situation in which it is employed. *Commissioner of Internal Revenue v. Chicago Portrait Co.*, 7th Cir. 1931, 50 F. 2d 683. We cannot say that it has an identical meaning in each of the instances where it is used in the treaty under consideration. We conclude, however, that as used in the last quoted portion of the treaty it means the two nations, the United States and Mexico. The word government," as used in the treaty, refers to the political agency through which the sovereignty of the nation is expressed and exercised.

The treaty apportioned the water of the Rio Grande and allocated the share that might be diverted and used on each side of the river, but without making or intending to make any provision as to how or by whom the water so apportioned and allocated should be used upon being diverted. Increases in diversion to and use upon either side is prohibited except upon the conditions stated. We think it was intended by the parties to the treaty that to each nation should be left the power of making determinations, pursuant to its own law, of those who are, may become, or cease to be, entitled to the use of the waters secured by the treaty to such nation, and their relative rights among themselves. If any intent had been present to create or protect or give a priority to individual property rights of one group resulting in the diminution or divestment of those of another group, the operative language would have been couched in more explicit terms.

The United States Supreme Court has set forth some of the generally applicable limitations on the Federal power by saying:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick v. Sullivant, 10 Wheat. 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State." United States v. Fox, 94 U. S. 315, 24 L. Ed. 192.

The doctrine of the Fox case has been held applicable in cases involving treaties. *Amaya v. Stanolind Oil & Gas Co., supra.* We do not say, and there is no need for saying, that a treaty cannot in any event supersede the laws of a State with respect to property rights and the manner of their transfer both voluntary and by operation of law, nor do we hold that a treaty may not change the method by which such rights may be determined or enforced. We only say that the treaty in question does not purport to have any such effect as to the respective water rights of the parties to this cause. We find nothing in the protocol that has bearing on the problem submitted by this appeal.

Our attention is directed to the hearings before the Senate Committee and to the evidence there adduced, to Senate discussions in the Committee room and on the Senate floor, to statements of the Secretary of State, of the Attorney General of Texas and others, and to other treaties involving other nations and other rivers. There is not, as we view the case, any need for a discussion of these matters. Such factors are to be considered and weighed when and only when the meaning of a treaty provision is uncertain and the treaty language is ambiguous or admits of more than one construction. See *Nielson v. Johnson*, 279 U. S. 47, 49 S. Ct. 223, 73 L. Ed. 607. The language of that portion of the treaty involved in this appeal is neither uncertain, ambiguous nor susceptible of more than one construction. We find nothing in the hearings, discussions, statements or other extraneous matters that would impel us to a conclusion different than that which we have reached. But, we think, if any uncertainty did exist it would be dispelled, and if any ambiguity were present it would be removed by the ratifying resolution of the Senate which provides:

> "That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Bountary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States."

The treaty provides for the disposition of such waters as might, after its effective date, become available for diversion and use upon the impounding of flood flows by dams and other works. These treaty provisions and the disposition of such waters as might be made available by them are not in this cause.

The Order of Dismissal entered by the District Court was proper and is AFFIRMED.

TUTTLE, Circuit Judge: I concur in the result.

FILED
FEB 15 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 634

HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1, *ET AL.*
Petitioners

VERSUS

WYATT C. HEDRICK, *ET AL.*
Respondents

RESPONDENTS' BRIEF OPPOSING WRIT OF CERTIORARI

H. H. RANKIN, JR.
P.O. Box 569,
Edinburg, Texas
Attorney for Respondents

MANN & BYFIELD,
RAYMOND, ALGEE,
ALVARADO, KAZEN & WOODS
Laredo, Texas.

JOHN A. POPE, JR.,
Rio Grande City, Texas.

RANKIN, KILGORE & CHERRY,
Edinburg, Texas.

OSCE FRISTOE,
FRED J. NEWLAND,
Harlingen, Texas.

DAVENPORT & RANSOME,
Brownsville, Texas
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 634

HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 7, *ET AL.*
Petitioners

VERSUS

WYATT C. HEDRICK, *ET AL.*
Respondents

RESPONDENTS' BRIEF OPPOSING WRIT OF CERTIORARI

Respondents respectfully oppose the granting of Petitioners' application for certiorari to the United States Court of Appeals, Fifth Circuit, in that:

PRELIMINARY STATEMENT

It is not disputed but that Petitioners claim the right to use the waters of the Rio Grande to irrigate non-riparian lands under "appropriation" statutes of Texas, or that Respondents are riparian proprietors on the left or Texas bank of the Rio Grande

at various points in Webb, Zapata, Starr, and Hidalgo Counties in that State; nor that Petitioners are seeking a declaratory judgment [R. 21] interpreting the Treaty of November 8, 1945, between the United States and the Republic of Mexico for the Utilization of the Waters of the Rio Grande and other rivers, which would subordinate the constitutional rights of riparian proprietors on the Texas bank of the Rio Grande to a supposed right resulting from the actual use of such waters as of the effective date of the treaty; that is, November 8, 1945. Petitioners' real purpose is to obtain a construction of the treaty which will overturn a long line of decisions by the Supreme Court of Texas which define and limit the rights of riparian proprietors, as well as those of "appropriators" of water under the Texas statutes and safeguard those rights; more especially *Motl* v. *Boyd,* 116 Texas 82; *Parker* v. *El Paso County Water Improvement District No. 1,* 116 Texas 631; *Humphrey-Mexia Co.* v. *Arseneaux,* 116 Texas 603; *Texas Company* v. *Burkett,* 117 Texas 16; *Chicago, Rock Island & Gulf Railway Company* v. *Tarrant County Water Control and Improvement District No. 1,* 123 Texas 432.

RESPONDENTS' FIRST COUNTERPOINT

Powers conferred on the United States section of the International Boundary and Water Commission, United States and Mexico, by Article 9 of the treaty of November 8, 1945, operate only to control the division of the waters of the Rio Grande below Fort Quitman, Texas, as between the high contracting parties, and cannot, and do not, create or affect the rights of American water users as among themselves.

Statement and Argument

The Treaty between the United States and Mexico for the Utilization of the Waters of the Rio Grande below Fort Quitman, Texas (and of other rivers), was signed at Washington, February 3, 1944, and a protocol thereto was signed at Washington, November 14, 1944. Treaty and protocol were clarified and

amended, and ratification advised "subject to certain understandings" by Resolution of the Senate of the United States, adopted April 24, 1945. The Treaty was ratified by Mexico, October 16, 1945, and "subject to said understandings" as recommended by the Senate, was ratified November 1, 1945, by the President of the United States. Ratifications were exchanged at Washington, November 8, 1945; and the Treaty was proclaimed by the President "subject to said understandings," as recommended by the Senate, November 27, 1945. The Treaty, under its terms, took effect November 8, 1945, when ratifications were exchanged.

Pertinent text of Article 9 of the Treaty, as signed February 3, 1944, reads:

> "(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey water belonging to it.
>
> "(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas, to the Gulf of Mexico divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information."

The United States Senate, by its Resolution of Ratification advised and consented to ratification of the Treaty, and the protocol supplementary thereto

". . . Subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty: . . .

"8. (b) *Insofar as they affect persons and property in the territorial limits of the United States,* the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of said Commission, and any other officer or employee of the United States, *shall be subject to the statutory and constitutional controls and processes.* . . .

"8. (c) *That nothing contained in the treaty or protocol shall be construed as authorizing* the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, *directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States.*"

Without violating these "understandings" the American Section of the International Boundary and Water Commission, United States and Mexico, cannot apply the provisions of Article 9 of the treaty otherwise than as safeguarding the division of waters as between Mexico and the United States.

Local law aside, and absent elucidation supplied by the Resolution of Ratification, Article 9 of the Treaty does not purport to accord to Petitioners individually, or as a class, any better rights to the use of the waters of the Rio Grande than they may have had on the effective date of the Treaty; nor does it purport to take from Respondents, or other riparian proprietors, their rights to the use of such waters existing as of that date. The Treaty was so construed by the officials of the Department by which it was negotiated, prior to the adoption of the "understandings."

[See 'Digest of Testimony of Witnesses for the Department of State and the United States Section, International Boundary

Commission, on the United States–Mexican Water Committee before the Senate Foreign Relations Committee"; Hearings before the Committee on Foreign Relations, United States Senate on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers, February 12, 13, 14, and 15, 1945, Part 5, pp. 1801–1816, printed in Part as Appendix "A" to this brief.]

And by competent authorities of the State of Texas: ["Testimony of Hon. Grover Sellers, Attorney General of Texas, February 14, 1945", before the same Committee id. Part 4, p. 1247, printed in part as Appendix "B" to this brief; and "House Concurrent Resolution No. 4 of the Legislature of the State of Texas, adopted January 10–11, 1945," in evidence before the Senate Foreign Relations Committee, id. Part 4, p. 1243, printed in part as Appendix "C" to this brief.]

RESPONDENTS' SECOND COUNTERPOINT

Respondents' rights as riparian proprietors are protected by "constitutional and statutory controls and processes," as well as by the Treaty of Guadalupe Hidalgo between the United States and Mexico, and the "understandings" which are made part of the treaty of November 8, 1945, preclude an interpretation of Article 9 of the treaty which would deprive them of these constitutional rights.

Statement and Argument

It is well settled that in actions of this character affecting appurtenances to land the Federal Courts apply the local laws of the state in which the land is situated, subject to the constitutional powers of the government of the United States. *United States* v. *Gerlach Livestock Company*, 339 U.S. 725; *Philadelphia Company* v. *Stimson*, 223 U.S. 605; *St. Louis* v. *Rutz*, 138 U.S. 226; *Christy* v. *Pridgeon*, 4 Wallace 196; *League* v. *Egery*, 24 Howard 264; *White* v. *Burnley*, 20 Howard 235. The "understandings" which forbid the Secretary of State and the United States Section of the International Boundary and Water Commission "directly or indirectly to alter or control the distribution

of waters to users within the territorial limits of any of the individual states," and require that their powers and functions "shall be subject to the statutory and constitutional controls and processes" insure the application of that rule in the instant case.

The Supreme Court of Texas has never hesitated to speak plainly of the protection accorded riparian rights through constitutional guaranties. In a line of decisions extending over two-thirds of a century that court has held:

In 1889 in *Mud Creek Irrigation Co.* v. *Vivian;* 74 Texas 171:

> "The legislature had no power to take away or impair the vested rights of riparian owners without providing for a just compensation."

In 1893 in *McGehee Irrigation Co.* v. *Hudson;* 85 Texas 587:

> "Plaintiffs' rights were such as could not be taken without condemnation and compensation . . . It was their right to have the water flow through their land in its accustomed channels; and to use it for all purposes for which a riparian proprietor may use the water so flowing."

In 1905 in *Watkins Land Co.* v. *Clements;* 98 Texas 528:

> "Subject to the right of natural use by other riparian proprietors, each riparian owner is entitled to use the water of a stream which flows by or through his land for the purposes of irrigation; provided such use is reasonable considering all the circumstances under which it is made."

In 1906 in *Bigham Bros.* v. *Port Arthur Channel & Dock Co.,* 100 Texas 192:

> "The right of a riparian owner to take water from the stream is property and comes within the protection of

the Constitution . . . Article 1, Section 17 . . . prescribes the rule . . . 'No person's property shall be taken, damaged or destroyed without adequate compensation being made, unless by consent of such person'."

In 1921 in *Board of Water Engineers* v. *McKnight;* 111 Texas 82:

> "The nature of the right of the riparian proprietor to apply flowing water to lawful uses, as property, is clearly disclosed by the Court's decision, by Chief Justice Stayton, that the proprietor could not be deprived of this right, even for the public benefit, without adequate compensation."

In 1926 in *Motl* v. *Boyd;* 116 Texas 82:

> "The decisions of this Court . . . appear to have settled the question that riparian rights to the use of the waters of the streams of this State for irrigation purposes were a part of the grants of land when the grants were made."

In 1927 in *Parker* v. *El Paso County Water Improvement Dis-No. 1;* 116 Texas 631:

> "The rights of the riparian to his just proportion of riparian water which flows by his lands is an incident to his ownership of the land, and is part and parcel of the land. It is within the constitutional guaranties."

In 1927 in *Humphrey-Mexia Co.* v. *Arseneaux, et al.,* 116 Texas 603:

> "A *riparian proprietor* . . . had the legal right to take riparian water from the stream and use it, or sell it for use on either riparian or non-riparian land unless it

thereby interfered with some other riparian owner . . . The oil company in this case . . . not being a riparian owner, could not object to the diversion of riparian water . . . The oil company had no justiciable interest in the riparian water."

In 1934 in *Chicago, Rock Island and Gulf Railway Co.* v. *Tarrant County Water Control and Improvement District No. One,* 123 Texas 432:

"Rights of riparians to use water, not only for domestic and household uses, but for irrigation as well, are vested rights, part of the grants of land when the grants were made."

An excellent summary of the English Common Law of riparian rights, when adopted as a rule of decision in Texas on January 20, 1840, and in California on April 13, 1850, is incorporated in the exhaustive opinion of the Supreme Court of California in *Lux* v. *Haggin,* 69 California 255, decided in 1886. The California Court summarized the English decisions which form the basis of the rule and said:

"By the common law the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passed with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners, for purposes hereafter to be mentioned. . . .

"As to the *nature* of the right of the riparian owner in the water, by all the modern, as well as ancient, authorities the right in the water is *usufructuary,* and consists not so much in the fluid itself as in its uses, including the benefits derived from its momentum or im-

petus. Ang. Water-courses, sec. 94 and notes. But the right to a water-course begins *ex jure naturae,* and, having taken a certain course naturally, it cannot be diverted to the deprivation of *the rights* of the riparian owners below. So say all the common-law textbooks, and the decisions. Ang. sec. 93. *Agua currit et debet currere solebat* is the language of the common law.' Id: *Shury* v. *Piggot,* Bulst. 339; *Countess of Rutland* v. *Bowler,* 290. '*As a general proposition,* every riparian proprietor has a natural and equal right to the use of the water in the stream adjacent to his land, *without* diminution or alteration.' Washb. Easem. 319. 'Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as is wont by nature, without *material* diminution or alteration.' Gould Waters, sec. 204. Each riparian proprietor has a right to the natural flow of the water-course undiminished, except by its reasonable consumption by upper proprietors. Ang. c. 4, *passim.* The right to the flow of the water *is inseparably* annexed to the soil, and passes with it, not as an easement or appurtenant, *but as a parcel. Use* does not create and *disuse* cannot destroy or suspend it. Each person through whose land a water-course flows has (in common with those in like situation) an equal right to the benefit of it as it passes through his land, for all useful purposes to which it may be applied; and no proprietor of land on the same water-course has a right *unreasonably* to divert it from flowing into his premises, or to obstruct it in passing from them, or to corrupt or destroy it. Chief Justice Shaw in *Johnson* v. *Jordan,* 2 Metc. 239. The right to the use of water flowing over land is undoubtedly *identified with the realty,* and is a real and corporeal hereditament. *Cary* v. *Daniels,* 5 Metc. 238. *Prima facie* every proprietor on each bank of a river is entitled to the land covered by the water to the middle thread of

the river, and has a right to the use of the water flowing over it. Occupancy of the flowing waters of a river *creates* no right, unless the appropriation be for a period which the law deems a presumption of right. Mr. Justice Story in *Tyler* v. *Wilkinson*, 4 Mason, 397. Whatever may be said of *Sampson* v. *Hoddinott*, I.C.B. (N.S.) 590, as bearing on the right to irrigate, it recognizes the riparian right. Cresswell, J., says: 'It appears to us that all persons having land upon a flowing stream have, by nature, certain rights to the use of the stream, *whether they exercise them or not*, and they may begin to exercise them whenever they will.'

"It has always been held that a grant of land carries with it the water flowing over the soil. The well-known maxim, *cujus est solum, ejus est usque ad coelum*, inculcates that land, in its legal signification, has an indefinite extent upward. *We need not add that rights to the use of water may be acquired by grant, under some circumstances by assent, and by adverse user and possession.*"

Subsequent history of the California law was related by Associate Justice Jackson in *United States* v. *Gerlach Livestock Company*, 339 U.S. 725.

Development of riparian law in Texas took a somewhat different turn, partly due to differences in terrain and climate, and partly to Texas' receiving greater impact from the earlier Spanish law. Riparian rights in California extended to all the waters of the stream. Texas only applies the riparian doctrine to the highest normal flow, leaving floodwaters subject to appropriate legislation by the State.

Earlier Texas cases had pointed out that riparian waters of Texas streams were not subject to appropriation, but the two types of waters were first fully distinguished, and rights of users fully defined in *Motl* v. *Boyd*, 116 Texas 82, decided in 1926, in which the Court said:

". . . we conclude that the cases in the main support our announcement that riparian rights attach only to the normal and ordinary flow of the stream as we have defined the normal and ordinary flow. . . .

"The construction and limitation which we give the doctrine of riparian rights in this state, under the conditions which are peculiar to us, is consistent with the legislative policy of the state covering a long period of time, and with the express declarations of the conservation amendment to the Constitution of the state.

. . .

"We therefore conclude that Spring creek is a public navigable stream under the statute, and that the title to its waters is in the state in trust for the public. . . . The waters are in trust for the public:

"First, for navigation purposes, which concerns all the public and is ordinarily regarded as a superior right;

"Second, the riparian waters of the stream are held in trust by the state for the riparian owners along its margins;

"Third, the nonriparian waters in the streams are held by the state in trust, to be controlled and disposed of by the state for the best interests of all the people;

"Fourth, the waters are in trust for uses and benefits not here involved.

"It now becomes necessary to determine what are the riparian and nonriparian waters of Spring creek. *We are of the opinion that riparian waters are the waters of the ordinary flow and underflow of the stream, and that the waters of the stream, when they rise above the line of highest ordinary flow,* are to be regarded as *flood waters, or waters to which riparian rights do not attach.*"

This doctrine was applied in *Texas Company* v. *Burkett,* 117 Texas 16, in which the Court held that

"Burket had the right to contract for the use of water obtained from his land on nonriparian land, so long as the supply was abundant and no injury resulted to lower proprietors. . . .

"What has been said with reference to riparian water flowing on the surface of the bed of the stream applies with equal force to riparian waters, if any, which might flow through the sand and gravel beneath the surface of the bed of the stream.

"The flood waters of a stream are those waters above line of ordinary flow of the stream, as defined by this court in the case of *Motl* v. *Boyd*, 286 SW 548. As to these waters, it is obvious that Burkett had not obtained a permanent water right in the sense that this term is used in the statutes. But he would have done so had the Texas Company desired it, since, as we have shown, he offered to obtain a statutory permit."

and in *Humphrey-Mexia Co.* v. *Arseneaux*, 116 Texas 603, where the holding was

"The water company did not claim under any rights by appropriation, *but asserted the right to pump the water out of the river and sell the same for mining purposes on both riparian and non-riparian land, purely as a riparian proprietor. . .*

"The defendant in error (Water Company) is *a riparian proprietor,* and *as such had the legal right to take riparian water from the stream, and use it or sell it for use on either riparian or nonriparian land,* unless it thereby *interfered with some other riparian* owner. *Texas Co.* v. *Burkett*, 296 SW 273. . . .

"All the waters in a stream below the highest line of its normal flow are riparian waters. *Motl* v. *Boyd* (Tex. Sup.) 286 SW 458. They therefore necessarily include the waters of the stream in holes or pools, after the river had ceased to flow, since these waters are within the

limit stated. In addition to this, all water when it comes, in the usual course of its migration, to rest permanently in a basin made by nature for that purpose, although it may have been flood water at one time, ceases to be flood water, and becomes a lake or pond.

. . .

"It is an elementary rule that riparian rights attach to all natural lakes and ponds, regardless of origin. . . .

Directly in point here is the decision in *Parker* v. *El Paso County Water Improvement District No. 1*, 116 Texas 631, relating to waters of the Rio Grande above Fort Quitman, Texas, and to that portion of the river affected by the treaty between the United States and Mexico signed May 21, 1906, in which the court said:

"We conclude that plaintiff in error's contention that his land, because riparian, could not be included in the improvement district is without merit, and it is overruled.

"If the plaintiff in error owns a ditch, *he cannot be deprived of property, nor its use, without consent or grant, or some form of due process.* U.S. Amend. 14; Const. Tex. Art. 1, Sec. 19; Long on Irrigation (2d Ed.) Sec. 118. But, as we understand the record in this case, and the decree and findings of the trial court, no effort is being made by the defendant in error to take plaintiff in error's property right in his ditch, or to deprive him of its use. As to that, he therefore was not entitled to an injunction.

"The plaintiff in error, as a riparian, has the right to take his just correlative proportion of riparian water from the Rio Grande river, and conduct it to and use it on his land. Long on Irrigation (2d Ed.) Secs. 34, 35; *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 86 SW 733, LRA 964, 107 Am. St. Rep. 653; *Board of Water Engineers* v. *McKnight*, 111 Tex. 82, 92, 229 SW 301.

"The Improvement District cannot take that water and distribute it without his consent, provided he desires to and does use it. The right of the riparian to his just proportion of riparian water which flows by his land is an incident to his ownership of the land, and is a part and parcel of the land. It is property within the constitutional guaranties. Long on Irrigation (2d Ed.) Sec. 34; *Board of Water Engineers* v. *McKnight,* 111 Tex. 82, 92, 229 SW 301.

"If the plaintiff in error does not take his proportionate share of the riparian water and use it, then that portion to which he is entitled, so long as he does not take it, under the modified rules of the common law applicable to the arid or semiarid states, increases the residue of riparian water in the river available for the use of others, including those whose lands are in the improvement district, and may be taken out of the river by them, or by the district for distribution, if they have authorized it to do so. Long on Irrigation (2d Ed.) Sec. 31; Kinney on Irrigation (2d Ed.) Sec. 549, and vol. 2, Sec. 1611; 2 Farnham on Water Rights, Sec. 497; *San Joaquin, etc. Irr. Co.* v. *Fresno Flume & Irr. Co.,* 158 Cal. 626, 112 P. 182, 35 LRA (NS) 832; *Modick, etc.* v. *Booth,* 102 Cal. 151, 36 P. 431, and *Humphreys-Mexia Co.* v. *Arseneaux,* 297 SW 225, and *Texas Co.* v. *Burkett,* 296 SW 273.

"However, we do not understand that the improvement district claims any right to take plaintiff in error's proportionate share of the riparian water, if he desires to use it, or that it is interfering with plaintiff in error's right to do so. As we understand the record, the district only claims the right to take from the river the flood waters impounded by the Elephant Butte dam by the United States Reclamation Service (or other flood waters, if any, to which it may be entitled), and the just proportion of riparian water which the riparian pro-

prietors in the district have severally consented it shall take and distribute. This the district has the right to do. As to this water, plaintiff in error has no claim or right. *As a riparian owner, he is only justly entitled to his proportion of the riparian water, which is the water below the highest line of the normal flow of the river. Motl* v. *Boyd,* (Tex. Sup.) 286 SW 458. As to the water above that *line, whether impounded by the United States Reclamation Service or running after rainfall in the bed of the stream, plaintiff in error has no interest except as a landowner in the district* taking water under the distribution of the district.

"... The defendant in error in using the channel and banks of the Rio Grande for delivering its storm, flood, or rain water from the place of storage to the places of use, was acting clearly within the terms of the statute, and within its legal rights, regardless of the question of riparian rights. Revised Statutes 1925, art. 7548; Long on Irrigation (2d Ed.) Sec. 117; 2 McKinney on Irrigation (2d Ed.) Sec. 832; I Wiel on Water Rights (3d Ed.) Secs. 38a, 39, 40; *Hoffman* v. *Stone,* 7 Cal. 46; *Miller* v. *Wheeler,* 54 Wash. 429, 103 P. 641, 23 LRA (N.S.) 1065; *Butte Canal & D. Co.* v. *Vaughn,* 11 Cal. 143, 70 Am. Dec. 769; *Wiggins* v. *Muscupiabe,* 113 Cal. 182, 45 P. 160, 32 L.R.A. 667, 54 Am. St. Rep. 337; *Wutchmna Water Co.* v. *Pogue,* 151 Cal. 105, 90 P. 362."

while in *Chicago, Rock Island & Gulf Ry. Co.* v. *Tarrant County Water Control and Improvement District No. 1,* 123 Texas 432, the court affirmed:

"We have heretofore held, after a lengthy review of grants under both the Mexican law and the laws of Texas, that rights of riparians to use water not only for domestic and household uses, but for irrigation as well,

are vested rights, part of *he grants of land when the* *Boyd*, 116 Tex. 82, 108, 286 *grants were made. Motl* SW 458.

"Having the *vested ri* riparian necessarily has t ful means of making the which in a semi-arid cou ter in the streamways or may be done consistently ians, and upon such reaso may prescribe, a right wh defeat or unreasonably bu trollable grants to railw upon, or along streams ar Water, vol. 2, Sec. 475; K vol. 2, Sec. 842, p. 1476; App. 242, 122 SW 300."

to use water as stated, the authority to adopt any law- ercise of the right effective, ry means the storage of wa- their valleys, so far as this ith the rights of other ripar- able terms as the Legislature h the Legislature could not len by irrevocable or uncon- companies to cross, build water courses. Farnham on ney on Irrigation (2d Ed.) *acy* v. *Delery*, 57 Tex. Civ.

Holdings in the cited cases ainly distinguish the two types of water rights recognized by the aws of Texas; that is, the right of riparian proprietors to use "ri rian" waters, being the ordinary flow of the stream, which are dicated to this riparian use; and "non-riparian" or flood wat s, being waters flowing in the stream above the line of highe normal flow. Each riparian pro- prietor is entitled to use his ju t proportion of the water which flows by his land, and if he d es not take it, then that portion which he does not use increas the residue of riparian water to which other riparians are ent ed, and may be taken from the river by them. Riparian wate are not "unappropriated," and do not become subject to appr priation unless and until all ri- parian proprietors are satisfie and then only a a temporary measure and to prevent waste.

"Non-riparian" or flood wa ers are subject to appropriation, and may be utilized by the app opriator in passing, or stored for future use. As between approp iators the first in time is first in right.

Petitioners are "appropriato s," and their rights as such are

subordinate to those of all riparian proprietors, insofar as riparian waters are concerned. Injoining respondents from using their proportionate shares of riparian waters would only increase the proportionate shares of other riparians and would not benefit petitioners.

The situation as to waters stored in reservoirs pursuant to the treaty is reflected in the two last cited opinions. One of the purposes of the treaty was to provide for the storage of flood waters. Petitioners are entitled to the use of stored flood waters in their order of priority as appropriators as determined by statutory law. Respondents and other riparian proprietors are entitled to have surplus riparian waters stored in treaty reservoirs, "insofar as this may be done consistently with the rights of other riparians, and upon such reasonable terms as the Legislature may prescribe." The principal benefit which the riparian proprietors derived from the terms of the treaty is the use of treaty reservoirs for regulating the normal flow of the stream and impounding portions of the normal flow "in the streamways or in their valleys," for use in times of need, and to prevent waste.

Waters stored in treaty reservoirs must be measured and allocated as between the United States and Mexican shares. That is a function of the International Boundary and Water Commission of the United States and Mexico. Little additional calculation is needed to further allocate the United States share of stored waters of the Rio Grande as between stored riparian waters in which respondents share, and stored flood waters, in which petitioners are entitled to participate according to their statutory priorities and rights. This is a function of an agency of the State of Texas. Because Texas has not as yet provided such an agency, there is some present confusion in the distribution of these waters. But that does not affect respondents' rights.

RESPONDENTS' THIRD COUNTERPOINT

Respondents hold their lands fronting on the Rio Grande under legitimate titles issued prior to March 2, 1836, by the governments of Spain and Mexico; and the rights and privileges accord-

ed by virtue of such grants which were part of the realty itself, or were servitudes or easements in connection therewith, including the reasonable use of the waters of the Rio Grande for irrigating the granted lands, remain in full force and effect, and are protected by the Treaty of Guadalupe Hidalgo, as well as by the "understandings" made part of the Treaty of November 8, 1945.

Statement and Argument

Ratification of the "Treaty of Peace, Friendship, Limits and Settlement, between the United States of America and the United Mexican States," concluded at Guadalupe Hidalgo, February 2, 1848, to "Put an end to the calamities of the war which unhappily exists between the two Republics," was advised March 10, 1848, with amendments (which included suppression of Article X of the Treaty) by the Senate of the United States, and the Treaty as amended was ratified by the President of the United States, with explanations of the amendments, March 16, 1848, and proclaimed by the President, July 4, 1848.

Articles V and VII of that treaty defined the Rio Grande boundary and protected the navigability of that stream. Provisions as to navigation were abrogated by the treaty of November 8, 1945, but the terms of Article VIII of the former treaty continue in full force and effect. These provide:

> "Article VIII. Mexicans now established in territories previously belonging to Mexico and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they may possess in the said territories, or disposing thereof, and removing the proceeds wherever they please. . . .
>
> "In the same territories property of every kind now belonging to Mexicans not established there shall be inviolably respected. The present owners, the heirs of

these, and all Mexicans who shall hereafter acquire said property by contract shall enjoy with respect to it guaranties equally ample as if the same belonged to the citizens of the United States."

Section 2 of the explanatory provisions annexed to the Treaty in consequence of the Senate amendments, read:

"The American Government by suppressing the Xth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of this article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

"Conformably to the laws of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2nd of March, 1836."

In the words of the Supreme Court of the United States in *U.S.* v. *Sutherland*, 19 Howard (U.S.) 364, followed by the Supreme Court of Texas in *State* v. *Corrigan*, 94 SW 95, 101:

"The United States have bound themselves by a treaty to acknowledge and protect all *bona fide* titles granted by the previous government; and this court has no discretion to enlarge or curtail such grants to suit our own sense of property, or defeat just claims, however extensive, by stringent technical rules of construction, to which they were not originally subjected."

Substantially all titles along the Rio Grande emanating from former governments have been confirmed by the political au-

thorities of Texas, under one or another of a series of legislativ relinquishments, or as adjudicated in subsequent suits. On th political side, this appears from such Texas statutes as Act o February 8, 1850, Gammel's Laws of Texas, III–582; Act of Feb ruary 10, 1852, Gammel's Laws of Texas, III–941; Act of Feb ruary 11, 1854, Gammel's Laws of Texas, III–1533; Act of Feb ruary 11, 1860, Gammel's Laws of Texas, IV–1471; Act of Au gust 15, 1870, Gammel's Laws of Texas, VI–375; Section 8, Arti cle XIV, Constitution of Texas, 1876; while as to all legitimat Tamaulipas titles originating prior to December 19, 1836, th courts of Texas have uniformly held that:

> "The claimant may rely upon his title under the laws of this State, including the Treaty of Guadalupe Hidalgo, which is binding as a law."

State v. *Sais*, 47 Tex. 307; *Clark* v. *Hills*, 67 Tex. 141; *Texas Mexican Ry. Co.* v. *Locke*, 74 Tex. 370; *Haynes* v. *State*, 100 Tex 426; *Cavazos* v. *Treviño*, 35 Tex. 133; *State* v. *Russell*, 85 SW 288 (Writ Refused); *State* v. *Gallardo*, 106 Tex. 274; *Kened Pasture Co.* v. *State*, 111 Tex. 200; *State* v. *Balli*, 144 Tex. 195

In *Texas-Mexican Railway Co.* v. *Locke*, *supra*, the Court o Texas annulled Section 4, Article XIII, of the Texas Constitutio of 1876, *as being in conflict with the Treaty of Guadalupe Hi dalgo*, and, therefore, of Clause 2, Article XI, of the Constitutio of the United States.

It is, of course, the settled law of Texas, and generally, that i determining the rights of holders of title under grants from prio sovereigns, the controlling laws are those in effect when th grants were made. *Manry* v. *Robison*, 122 Texas 216; *Miller* v *Letzerich*, 121 Texas 248; *Motl* v. *Boyd*, 116 Texas 82; *State* v *Grubstake Investment Association*, 117 Texas 53; *State* v. *Ball* 144 Texas 195; *Cox* v. *Robison*, 105 Texas 426; *Green* v. *Robi son*, 109 Texas 367; *Mitchell* v. *Bass*, 33 Texas 259; *Cowan* v *Hardeman*, 26 Texas 267.

In the language of the Supreme Court of Texas in *Miller* v *Letzerich*, *supra:*

"*In determining the power of the Legislature to pass laws* affecting surface water rights for the state generally, we must necessarily consider the effect of the grants made by each sovereignty in their relationship to the subject. Lands in Texas have been granted by four different governments, namely the Kingdom of Spain, the Republic of Mexico, the Republic of Texas, and the State of Texas. Many millions of acres were granted by Spain, Mexico, and the Republic of Texas prior to the adoption by the latter of the common law of England as the rule of decision in 1840. *Motl* v. *Boyd,* 116 Tex. 82, 286 SW 458. . . .

"From these authorities it is plain, we think, that whatever title, rights and privileges the inhabitants of Texas received by virtue of land grants from the Spanish and Mexican governments, which were a part of the realty itself or were easements or servitudes in connection therewith, remained intact, notwithstanding the change in sovereignty and the subsequent adoption of the common law as a rule of decision."

For the reason that the Spaniards practiced irrigation while the English did not, the Spanish Law of Waters under which Respondents' lands were granted was more favorable to the riparian proprietor with regard to irrigation than was the English Common Law. This was especially true as to maintaining access to the stream by means of servitudes and easements. Thus Dr. Joaquin Escriche, noted Spanish Juris-Consult [*Diccionario de legislación y jurisprudencia,* topic *Aguas*] affirmed the Spanish law as being:

"When a property on a river bank is divided amongst several joint or common owners, in a manner that the portions which are assigned or sold to any of them, and which now form other small properties not bounding on the stream, they preserve, nevertheless, one with another, their right to the water in the same proportion

that they had before the division even when nothing should have been stipulated on this subject." (See Wiel on Water Rights in the Western States, 3d Ed., Section 1027, p. 964: Translation from Hall's Irrigation Development.)

Wiel's translation of Escriche's *Aguas* is annexed to this brief as Appendix "D."

CONCLUSION

It cannot be presumed that the language of the treaty contained a hidden purpose to take property rights from one group of citizens and deliver them over to another, without just compensation and without due process of law, notwithstanding that the treaty was ratified and approved by the Senate upon express understandings that it should not have that effect.

Respondents respectfully submit that the petition for certiorari is without merit, and pray that it be denied.

H. H. RANKIN, JR.
P.O. Box 569,
Edinburg, Texas

Attorney for Respondents

MANN & BYFIELD,
RAYMOND, ALGEE, ALVARADO, KAZEN & WOODS
Laredo, Texas.

JOHN A. POPE, JR.,
Rio Grande City, Texas.

RANKIN, KILGORE & CHERRY,
Edinburg, Texas.

OSCE FRISTOE,
FRED J. NEWLAND,
Harlingen, Texas.

DAVENPORT & RANSOME,
Brownsville, Texas.

Of Counsel

I, the undersigned member of the bar of this Court, attorney for the Respondents, certify that I have on this ——— day of February, 1956, deposited in the United States Post Office, with first class postage prepaid, one copy of the foregoing brief addressed to each of attorneys for Petitioners, viz. Sawnie B. Smith, P.O. Box 52, Edinburg, Texas, and Hill, Lochridge & King. P.O. Box 32, Mission, Texas.

H. H. RANKIN, JR.

Attorney for Respondents.

APPENDIX "A"

DIGEST OF TESTIMONY OF WITNESSES FOR THE DEPARTMENT OF STATE AND THE UNITED STATES SECTION, INTERNATIONAL BOUNDARY COMMISSION ON THE UNITED STATES–MEXICAN WATER TREATY, BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE. [Hearings before the Committee on Foreign Relations, United States Senate, on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers, February 12, 13, 14 and 15, 1945, Part 5 pp. 1801–1816]

"So far as the Rio Grande is concerned the effects of the treaty are limited to the reach between Fort Quitman, Tex., and the Gulf of Mexico. Fort Quitman is about 85 miles below El Paso. The waters of the stream above Fort Quitman were allocated under the treaty of 1906. (p. 1808)

"The pending treaty allocates to the United States all of the waters contributed to the main stream by the principal United States tributaries below Fort Quitman, including the Pecos and Devils River; one-third of the contributions to the main stream from the principal Mexican tributaries above Salineño, Tex., which Mexico guarantees to be not less than 350,000 acre-feet per year; and one-half of all other flows in the Rio Grande, except those of the San Juan and Alamo Rivers, Mexican tributaries below Salineño, Tex., which empty into the Rio Grande below the lowest feasible reservoir site. To Mexico is allocated all of the contributions to the main stream from the San Juan and Alamo Rivers; two-thirds of the contributions from the principal Mexican tributaries above Salineño, Tex., subject to the guarantee to the United States of the minimum of 350,000 acre-feet per year

from these sources; and one-half of all other flows occurring in the main channel of the Rio Grande.

"The effect of these allocations is to guarantee to the United States the use of about one-half of all the water of the river, and about 60 per cent of all such water which can be impounded in reservoirs on the main stream; this, despite the fact that most of the water of the Rio Grande below Fort Quitman comes from Mexican tributaries. Under future depletions upstream it is expected that the total average stream flow into the reservoirs will be about 3,400,000 acre-feet, of which approximately 2,000,000 acre-feet will belong to the United States.

"It is estimated that the conservation of water in the reservoirs to be constructed on the Rio Grande will make possible the irrigation of about 400,000 additional acres in the United States, or an estimated total, including lands now irrigated, of about 900,000 acres of land. (p. 1809) . . .

"General supervision of the administration of the treaty is delegated to the International Boundary Commission, created by the convention with Mexico, March 1, 1889, its name being changed by the pending treaty to the International Boundary and Water Commission. The pending treaty serves merely to extend the jurisdiction of this Commission to embrace general supervision over the carrying out of treaty functions. (p. 1809) . . .

"On the Rio Grande, as has been said, the only works which are specifically provided for are the international storage and flood-control dams, which must necessarily fall under the jurisdiction of the Commission. Diversion dams and other ancillary works, and works of flood control and river rectification are left for future determination. To the extent that they may be built in the future, the international works of this character would likewise be under the jurisdiction of the Commission. The only works, then, which apparently come under the jurisdiction of the American section alone, are the gauging stations near the mouths of the tributaries necessary to measure the United States contributions to the main stream. Many of these gauging stations are presently being operated and maintained by the American section. (P. 1814) . . .

"On the Rio Grande, for instance, the principal duties of the Commission will be to build, operate, and maintain the international works on the boundary portion of the river, and to keep account of the waters allocated to each country. The duty of the American section will be to measure inflows into the main stream from the American tributaries, so that the United States will receive credit therefor, and to measure certain diversions and uses which are chargeable against the United States allocations. *With respect to the use within the United* (P. 1814) *States of its share of the waters, neither the Commission nor the American section has any jurisdiction whatsoever.*" (P. 1815)

APPENDIX "B"

TESTIMONY OF HON. GROVER SELLERS, ATTORNEY GENERAL OF TEXAS, FEBRUARY 14, 1945. [Hearings before the Committee on Foreign Relations, United States Senate, on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers, February 12, 13, 14 and 15, 1945, Part 4, p. 1247]

"In the final analysis the powers of the Commission and of the American section are narrowly circumscribed and are subject to the control of the two Governments.

"Under articles 5 and 9 of the treaty, the existing diversions and uses along the Rio Grande in both countries are fully protected. As to future diversions, the American section is limited to a determination that water within the share of the United States is available at the time and place of the proposed new diversion with which to supply it. It should be noted that this determination as to American diversions is to be made by the American section, not by the Commission. Since articles 8 and 9 require the Commission, and not the two sections, to keep accurate records of the quantities of waters in the reservoirs and flows in the main stream within the allocated share of each country, this determination by the American Commissioner is purely factual and ministerial. *No discretion is vested in him as to such determination. Where the water is to be used and at what times and in what quantities, as well as all titles to realty on the American side, are entirely matters for the determination of the duly constituted authorities of the State of Texas under the provisions of State law.* The effect of the treaty, however, will be to give added value to water rights along the Rio Grande in Texas, because it will afford an adequate supply of water upon which these rights can

operate. *There is nothing in the entire treaty even suggestive of any right or power in the Commission or either of its sections to pass upon the validity or respective priorities of private rights. Those matters will continue to be determined by the State law.*"

APPENDIX "C"

HOUSE CONCURRENT RESOLUTION NO. 4 OF THE LEGISLATURE OF THE STATE OF TEXAS, ADOPTED JANUARY 10–11, 1945. [Hearings before the Committee on Foreign Relations, United States Senate, on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers, February 12, 13, 14 and 15, 1945, Part 4, p. 1243]

"Whereas general administration of the treaty is confided to the International Boundary Commission, United States and Mexico, an old and experienced agency with a long record of successful administration of water and other problems along the Mexican boundary; and

"Whereas the administrative provisions of the treaty are adequate for the efficient discharge of treaty functions, *but in no way encroach upon the rights of the States to handle and control their water problems, including the distribution and use of the waters allocated to the United States, nor do said administrative provisions infringe in any way upon the rights of municipalities, communities and individuals within the States,* nor do said administrative provisions conflict with the jurisdiction of other established agencies, Federal, State, or local: Therefore, be it

"Resolved by the House of Representatives of the State of Texas, the Senate concurring, That the Texas Legislature go on record endorsing the ratification of said treaty . . ."

APPENDIX "D"

SPANISH LAW OF RIPARIAN WATERS

From *Diccionario de legislación y jurisprudencia,* Dr. Joaquin Escriche (1842) Topic *Aguas.*

[Translation from Wiel on Water Rights in the Western States (3d Ed.) Part IV, Section 1026, pp. 961–962; Section 1027, p. 964]

"If running water passes between the properties of different owners, each one of the latter can use it for the irrigation of his property, or for any other object; not entirely, however, but only in the part that belongs to him, because all have equal rights, and consequently, they can prevent each other from taking more than their respective shares. When the water passes within a property, the owner can use it arbitrarily, for, since both banks are his, he has not to subject himself to the interests of an opposite riparian owner; but at the outlet of his estate, he must return it to its natural or ordinary channel, without having power to absorb it, or entirely consume it, nor give it another direction, because it does not belong to him as a property, but only to the extent of the use which he can make of it in its passage. Since, then every riparian proprietor can use the water which passes by the edge of his property to irrigate it, it is clear that he can open drains, irrigating canals and ditches, and even construct a dam or other structure to take and carry it to his property, provided he does not make it overflow the higher lands against the will of their owners or inundate the lower lands in a way that may cause injuries, nor hold it in such a way that the neighbors are deprived of their accustomed irrigation. None of the riparian proprietors can construct works on the property of another with-

out his consent, nor even raise on it a weir or dam to cause the waters to enter more abundantly on his property; since all have the same rights, the works ought not to be made, except in such a way that the water will be divided with equality. But this principle of equality in the division of the waters is subordinate to the interest of agriculture, which will regularly demand that the greater quantity be devoted to the estates of greatest extent, as the Roman law required. Nevertheless, as the largest estate does not always need the greatest amount of water, the maxim of the Romans ought not to be applied except under certain restrictions. As the higher proprietors cannot absolutely deprive the lower ones of the use of the water, but must restore it to its natural channel after having made use of it, except the inevitable loss caused by the irrigation; in the same manner, in an inverse sense, the owners of mills, water-wheels, fulling-mills, factories, and other industrial establishments, have no such right to all the water necessary for the movement of their machines that they can deprive totally of it the proprietors of the higher properties. Nevertheless, when it is a question of mills in a country where there are few, and, on account of a drought they need all the water, there ought to be suspended on their account, for the common good, the irrigation of the meadows and the other properties as long as the state of drought lasts.

"A riparian proprietor can transfer the right of taking the water by renunciation, cession, sale, or other means in favor of the proprietor on the other side, or of him lower down, and if, having two properties, he gets rid of one, he can reserve the exclusive right of using the water for that which he preserves, or conceding it for that which he transfers. The riparian proprietor cannot, without the consent of the other riparian owners interested, concede to a third party, to their injury, the power of taking water from the same stream or on to his estate, nor himself use the water to irrigate another property which belongs to him, but which is not situated on the bank, although this right can be acquired by prescription. When a property on a river bank is divided amongst several joint or common owners, in a manner that the portions which are assigned or sold to any of them, and

which now form other small properties not bounding on the stream, they preserve, nevertheless, one with another, their right to the water in the same proportion that they had before the division, even when nothing should have been stipulated on this subject. . . . The proprietor who augments the extension of his riparian property by the acquisition of lands contiguous, which increases it, cannot take *more* water than formerly for his irrigation, to the detriment of the other interested parties; since, if he had the power he could in time render illusory the rights of the other riparian proprietors."